United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

ORIGINAL

75-1153

To be argued by
JAMES SCHREIBER

United States Court of Appeals
FOR THE SECOND CIRCUIT

DOCKET NO. 75-1153

UNITED STATES OF AMERICA,
Appellee,

v.

JACKSON D. LEONARD,
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

REPLY BRIEF FOR JACKSON D. LEONARD

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Further, the origins of the investigation, the manner in which it was conducted and the functions actually performed by Agent Laski demonstrate that he was a part of a criminal investigation.

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REPLY BRIEF FOR JACKSON D. LEONARD

Introduction

The government's legal arguments are without merit for the reasons set forth below.

ARGUMENT

POINT I

The investigation of Leonard was clearly a criminal investigation. The government concedes that in order to obtain approval for the mail cover, it was necessary for the IRS to comply with Post Office regulations, under which the IRS was required to represent that it was conducting a criminal investigation.

The government cannot now disclaim that representation because the IRS failed subsequently to comply with its own regulations governing the conduct of criminal investigations.

Further, the origin of the investigation, the manner in which it was conducted and the functions actually performed by Agent Laski demonstrate that he was a part of a criminal investigation.

The Second Circuit has not considered the effect of the IRS news releases on investigations conducted subsequent to 1967 or 1968. Any claim to the contrary is totally inaccurate.

The statements allegedly made by Leonard to Agent Laski, without the benefit of the required warnings, were not voluntary. In any event, the jury was not properly instructed.

1. The IRS represented to the Post Office that the FBA project was a criminal investigation.

The government concedes that the IRS was bound by Post Office regulations, *Post Office Manual*, Part 861, governing the conduct of the mail watch aspect of Leonard's investigation (footnote at G. Br. 33).* The regulations specifically provide that they "establish the sole authority

* "G. Br." refers to the government's brief; "A. Br." to appellant's brief; "GX" to government trial exhibits; "DX" to defendant's exhibits; "CX" to court exhibits; "DXH" to defendant's hearing exhibits; "GXH" to government's hearing exhibits; "A" to appendix; "E" to the exhibit volume.

and procedure for initiating, processing, placing and using mail covers." Part 861.2. Under these regulations, the IRS was required to represent that it was conducting a criminal investigation.

The relevant sections of the *Post Office Manual* are Part 861.41 and 861.42 (Addendum Appellant's Brief, p. 3a), which provide as follows:

> "The Chief Postal Inspector is the principal officer of the Post Office Department in the administration of all matters governing mail covers. . . .
>
> "The Chief Postal Inspector . . . may order mail covers [only] under the following circumstances:
>
> * * *
>
> "b. When written request is received from any law enforcement agency wherein the requesting authority stipulates and specifies the reasonable grounds that exist which demonstrate the mail cover is necessary to . . . (3) *obtain information regarding the commission or attempted commission of a crime.*" [Emphasis added]*

Notwithstanding the import of these regulations, the government takes the position that the FBA project (of which the investigation of Leonard was a part) was essentially civil in nature (A. 355a-367a, 407a) (G. Br. 33). In effect, the government now seeks to disclaim the representation that the Post Office regulations clearly required the IRS to make.

The reason for this apparent disclaimer is because the IRS subsequently violated its own regulations governing the conduct of criminal investigations when agent Laski failed to inform Leonard at the outset both that he was the

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* The government cites a different subsection of the Postal Manual governing the authority of *local* Postal Inspectors in Charge. See Part 861.5. However, while there is a slight difference in the wording, it is apparent that the identical standards apply because the regulations provide that "any request from a Federal [law enforcement] agency for a mail cover and the determination made [by the local Postal Inspector] shall promptly be transmitted to the Chief Postal Inspector [in Washington, D.C.] for review." Part 861.51b. In any event, the local Postal Inspectors in Charge would not have broader authority to authorize mail covers than the Chief Postal Inspector in Washington, D.C.

target of a criminal investigation and that he had a right to refuse to answer all questions and consult with counsel, since whatever he said could be used against him in a court of law.*

The government cannot have it both ways. Either, as the IRS represented to the Post Office in 1967 or 1968, the FBA project was a criminal investigation [in which case the IRS improperly failed to give Leonard the required warnings—*U. S.* v. *Leahey*, 434 F.2d 7 (1 Cir. 1970); *U. S.* v. *Heffner*, 420 F.2d 809 (4 Cir. 1969)], or the mail watch was part of a civil investigation [in which case the mail watch was improperly authorized since it was based upon a material representation now admitted by the government to have been false—*Wong Sun* v. *U. S.*, 371 U.S. 471 (1963)]. In either case, Leonard's statements should have been suppressed. *Leahey, supra, Heffner, supra, Wong Sun, supra.*

2. The record demonstrates that from its origin the IRS investigation of Leonard was criminal.

Totally aside from the fact that the IRS represented to the Post Office that it was conducting a criminal investigation, the record demonstrates that, from its origin, the investigation of Leonard was criminal, regardless of whether it was initially triggered by an informant's allegation of criminal conduct or by the FBA project (A. 334a).

a. The IRS generally referred informants' allegations to the Intelligence Division.

Despite the government's present suggestion to the contrary, the firm IRS practice in 1968 was to refer in-

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* Seeking to minimize this IRS representation, the government makes the contention (tucked away in a footnote) that "there is no inconsistency" between the previous "IRS representation to the Postal authorities" and its opposite claim now asserted that the investigation was civil (G. Br. 33 fn.). According to the government, these inherently inconsistent positions are reconcilable because the government in the future intended to prosecute "other . . . [taxpayers] ultimately detected through the latter use of the audit techniques developed by the FBA project" and that therefore the investigation was essentially civil. (G. Br. 33 fn.) However, this argument would permit mail watches in every routine IRS audit on the theory that such audits might lead to criminal prosecution in the future. If this argument is correct, it would nullify the explicit limitations for mail watches contained in the Post Office regulations. Part 861, *supra.*

formants' reports of criminal conduct (called "information items") to the Intelligence Division, which conducts only criminal investigations (A. 415a). As noted, the IRS investigation began with an informant's allegation that Leonard was receiving and failing to report "kickbacks"—i.e., commercial bribes—from Treadwell (A. 334a). At the pretrial hearing, Morris testified unequivocally that only if there was a temporary "manpower" shortage in the Intelligence Division would such cases be sent to the Audit Division for preliminary investigation:

> "Q. 'Information items' which are sent to the Internal Revenue Service are referred to the Intelligence Division, are they not? A. *At first, yes.*
>
> Q. And then, after the special agents look at them, they sometimes give them to the revenue officers [i.e., revenue agents] to investigate; is that right? A. The revenue agent. Yes. The revenue officer is another person entirely.
>
> Q. The revenue agent. I beg your pardon. A. Yes. A certain portion are sent to Intelligence, and *if they can't handle them, because of limited manpower* [then] *they send it to the Auditing Division,* which screens it out for productivity and sends it to—
>
> Q. They keep some themselves and give others to Audit; is that right? A. Yes.
>
> Q. And was that done in the Leonard case with respect to the information item? A. I presume so.
>
> Q. You don't know? A. No." [Emphasis added] (A. 414a-415a).

Therefore, since it was the procedure in 1968 for Special Agents to investigate informants' allegations of criminal conduct, had there been no "manpower" problem in June or July 1968 Leonard would have been investigated by a Special Agent (in the absence of the FBA project) who would have been required to give him the warnings set forth in the two IRS news releases. However, because there just happened to be a "manpower" shortage at the time,*

* No doubt caused by summer vacation schedules in the Intelligence Division in New York.

Leonard's case was referred to the Audit Division and Revenue Agent Rothstein was assigned (A. 404a, 409a-410a; GHX 1 at E. 627).

Since Leonard's investigation was precipitated by a criminal accusation, Leonard should have been given the IRS news release warnings, even though the investigation was conducted by a Revenue Agent, *U. S.* v. *Harary,* 70 Cr. 1104 (C.M.M.) (SDNY 4/23/71), 71-1 USTC § 9362. Certainly, Leonard's right to such a warning should not be contingent on the fortuitous occurrence of when summer vacations were taken in the Intelligence Division—i.e., whether a Special Agent was assigned (which was generally the rule) or whether a Revenue Agent was assigned.*

b. The origin of the FBA project was also in the Intelligence Division.

The origin of the FBA aspect of Leonard's investigation was also in the Intelligence Division. The FBA project began with Special Agents (exclusively) performing the mail watches, which lasted over two entire 120 day periods in 1968 and 1969 (A. 396a-397a). It was Special Agents who utilized and compiled the master list of stamp meter numbers corresponding to particular Swiss banks and produced the computer printout of taxpayers and the names of Swiss banks with whom they corresponded. It was also apparently Special Agents who initially wrote to such Swiss banks, falsely representing themselves to be American citizens interested in opening Swiss bank accounts (CX 1 at E. 1).

Only subsequently did Revenue Agents become actively involved in the investigation. Revenue Agent Morris joined Special Agent Boller and together they reviewed the tax returns of the thousands of addressees, whose mail

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* The government also contends that the fraud referral report in this case, authorized by agent Laski, was "wholly devoted to the facts [in] the original informant's report." (G. Br. 34) Indeed, this is a compelling admission that the original investigation was a criminal investigation.

It should also be noted that despite defendant's request, which was never abandoned (A. 400a-402a), neither the informant's identity nor his report was ever disclosed.

had been intercepted and microfilmed by Special Agents. Boller, along with Morris, thereafter made the actual selections of the 110 "good candidates" targeted for investigation (A. 364a, 369a-399a).

3. The FBA project aspect of Leonard's investigation was conducted as a criminal investigation.

The record further demonstrates that the FBA project aspect of Leonard's investigation was conducted as a criminal investigation. The tactics employed by the specially selected Revenue Agents were criminal investigation techniques derived from Special Agent Boller's input into the project (A. 369a).

It was apparently Boller's decision to withhold mail cover information from the taxpayer during the audits* (A. 360a). This was clearly a criminal investigatory technique. Since an auditor's function is to determine the correct tax liability on the basis of all the facts, he necessarily must follow the practice of advising the taxpayer of all entries or apparent omissions which require explanation. Therefore, the concealment of facts which might elicit additional information is inherently inconsistent with this basic auditing objective. Despite this fact, concealment was the official policy:

> "Examining officers will *not* advise the taxpayer that the Service has information concerning his utilization of a foreign bank account. If the examination does not disclose evidence of such involvement, *careful questioning* will be required to elicit the necessary information or explanation." [Emphasis added] (DX E at E. 507)

The tactic of utilizing a direct approach to the taxpayer, after the normal and special audit techniques failed to corroborate the existence of the Swiss account, was also developed by Boller, with Morris' assistance (A. 370a). Where

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* The government contends that this information was withheld only "at the outset" of the investigation (G. Br. 19). The fact of the matter is, however, that this information was *never* explicitly disclosed to the taxpayer, who at most was asked only generally whether he had any "foreign bank accounts".

the taxpayer was otherwise represented by counsel or an accountant, the direct approach to the taxpayer simply to ask the foreign bank question served no legitimate audit purpose, since the question could just as easily have been asked of the taxpayer's representative.*

The follow-up tactic of seeking an affidavit confirming the oral denial was also the result of Boller's decision (A. 370a). Since the affidavit was sought when there was no independent corroboration of the information derived from the mail watch, the affidavit served no legitimate audit purpose, but in fact demonstrates that the Intelligence Division was already focusing on future court action.

Indeed, the affidavit was "a technique" to squeeze an admission out from the taxpayer (A. 370a). As Morris himself remarked:

> "If a taxpayer . . . has to put something in writing, when a taxpayer has to sign a statement that he has no Swiss bank account . . ., he's apt to think twice rather than just saying 'No, I don't have any account, never heard of such a thing' and that was the purpose of this statement." (A. 370a)

Boller was consulted by Morris throughout the audit stage of the project. Notwithstanding Morris' claim to the contrary, it offends common sense to assume that they did not discuss individual cases (A. 369a). Apparently to create the appearance that the agents in the field were

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* The government lamely contends (at G. Br. 23) that the reason the agents conducting the investigations in the field were specifically "instructed" to bypass the taxpayer's "accountants or attorneys" and "to directly ask the taxpayer" the foreign bank question was because the taxpayer's representatives "may well have been given no knowledge of the existence of the Swiss account by the client." Of course, even if that were true, the "accountants or attorneys" could always inquire of their clients and report the information back to the agents. However, the fact that the agents in the project insisted on personal confrontations demonstrates that these meetings were designed to obtain either admissions or false denials.

doing routine audits without control or input from Special Agents, all decisions reached between Boller and Morris were communicated by Morris alone to the Revenue Agents in the field. Thus, the government's claim that "Boller had no [direct] contact with the revenue agents" is irrelevant (G. Br. 34) (A. 408a-409a).

Furthermore, as Morris testified, Boller and he were at least equal partners in the investigation (A. 391a). They shared one office and had joint control over files. On occasion, according to Morris, Boller received and read monthly reports from the Revenue Agents working in the field. While Morris claimed that to his knowledge these occasions were relatively "rare", Boller never testified. In any event, it cannot realistically be assumed that Boller took no more than a passing interest in audits of tax returns he had selected.

Most importantly, the government makes no mention at all of other important indicia noted in Leonard's brief in chief that the FBA project was a criminal investigation (A. Br. 27-31). During the alleged "audit" stage, Boller, with Morris' assistance, selected a group of "20 odd" good candidates, who had orally denied having an account and had also signed affidavits confirming the denial, and referred them to the U.S. Attorney's office for the Southern District of New York for questioning by Assistant United States Attorneys in the criminal division (A. 393a). The use of a federal prosecutor's office is completely inconsistent with the government's respresentation that the investigation was strictly civil. Further, while IRS regulations limit mail covers only to criminal investigations, the mail watch of Leonard and others was continued in 1969, during the course of the audits (DX A, B and C at E 624-626; A. 394a-397a). Additionally, the FBA investigation was "top secret" and was not disclosed, even to other IRS agents, except on a "need-to-know" basis (A. 283). These are all clearly characteristic of a criminal (not a civil) investigation.

4. Since Agent Laski was performing the functions of a Special Agent, it is irrelevant that the IRS called him a *Revenue* (rather than a Special) Agent; Laski was still required to warn Leonard of the criminal nature of the investigation and of his right not to cooperate.

It is irrelevant that Agent Laski was nominally a Revenue Agent rather than a Special Agent, since he was performing the functions of a Special Agent. As Judge Metzner stated unequivocally in *U. S.* v. *Harary*, 70 Cr. 1104 (C.M.M.) (S.D.N.Y. 4/23/71), 71-1 USTC § 9362, the standards of conduct set forth by the IRS news release apply equally to *Revenue* Agents (as well as Special Agents) conducing non-custodial criminal investigations.

The United States Supreme Court has also emphasized that it is the reality of the situation, rather than the nominal status of a government employee, that determines whether there is a requirement to give warnings. In *Mathis* v. *U.S.*, 391 U.S. 1 (1968), the Supreme Court suppressed statements made to a Revenue Agent who failed to give the taxpayer warnings because the taxpayer was in custody on an unrelated charge and the situation was inherently coersive.

The record demonstrates that the FBA project aspect of Leonard's investigation was focused on Agent Laski's obtaining a face-to-face meeting with Leonard. Laski's purpose was not simply, as the government contends, to ask Leonard "an agenda" of questions* (G. Br. 23), but rather specifically to ask him the foreign bank question. Indeed, Laski himself disclosed the purpose:

> "Q. Well, when you had this conversation, you claim you had with Mr. Leonard, you were told to go do that by your project leader or your superior in this [FBA] project, is that right? A. I was told to confront the taxpayer and ask him if he had a foreign bank account.
>
> Q. Well, the answer to that question is yes. A. Yes." (A. 286-287)

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* The so-called agenda was an obvious ploy to conceal the true purpose since the accountant Leskowicz could have answered all of Laski's questions himself.

The personal meeting, which as noted previously served no legitimate audit purpose, was designed to squeeze an admission or false denial from Leonard through "careful questioning" which would elicit "the necessary information". Failing that, Laski sought an affidavit from Leonard who would "think twice" before signing a denial. (DX E at E 508) (A. 370a).

5. The Second Circuit has not considered the effect of the IRS news releases on investigations conducted subsequent to 1967 and 1968.

The government's contention to the contrary is totally inaccurate.

The government contends that the Second Circuit in *U.S.* v. *Caiello,* 420 F.2d 471 (2nd Cir. 1969), considered the effect of the IRS news releases governing the conduct of criminal investigations. This contention is totally without merit.

While it may be nominally accurate to say that the appellant's brief in *Caiello* contained citations to the news releases, the fact of the matter is that the appellant Caiello was interviewed by IRS agents on June 3, 1964, three years before the IRS first issued the news releases. *Id.* at 474. Since the IRS news releases issued, in 1967 and 1968, were only operative prospectively (not retrospectively), they were simply not relevant to the *Caiello* case, which was undoubtedly the reason why they were not cited by this Court in its fairly lengthy opinion.

The only authority cited by the government as to why this Court should not require the IRS to comply with its own regulations governing the conduct of criminal investigations and follow the First and Fourth Circuits, *U.S.* v. *Heffner, supra,* and *U.S.* v. *Leahey, supra,* is a district court case in *Hawaii, U.S.* v. *Fukushima,* 373 F. Supp. 212 (D. Haw. 1974). However, a reading of *U.S.* v. *Fukushima* demonstrates that the Special Agents in that case substantially complied with the 1967 and 1968 IRS news releases. *Id.* 213-214. Indeed, the actual basis of the court's decision there was that the mere "failure of the Special Agent to use the magic word 'criminal' in stating the purpose of his investigation is [not] a 'substantial'

deviation from the IRS procedures" that would require suppression of the statements. *Id.*

Indeed, *U.S.* v. *Fukushima* is entirely consistent with the decisions of the First, Fourth and Fifth Circuits requiring the IRS to comply with the procedures outlined in the IRS news releases, but which also hold that substantial rather than literal, compliance is sufficient. *U.S.* v. *Bembridge*, 458 F.2d 1262 (1 Cir. 1972); *U.S.* v. *Leahey, supra; U.S.* v. *Morse*, 491 F.2d 149 (1 Cir. 1974); *U.S.* v. *Mathews*, 464 F.2d 1268 (5th Cir. 1972). Here, however, the record is absolutely clear that no warnings of any sort were given to Leonard by Laski at the outset of his initial meeting* (A. 418a).

There are substantial practical reasons why the IRS should be required to follow its own regulations governing

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* The government cites a string of cases which it claims establish that "non-fraudulent deviations" from regulations governing the conduct of interviews for law enforcement agents "are of no moment". (G. Br. 39) (E.g. *United States* v. *Bradley*, 447 F.2d 224 (2d Cir. 1971) (U.S. Postal Inspection); *United States* v. *Hall*, 493 F.2d 904 (5th Cir. 1974) (U.S. Secret Service); *United States* v. *Castellana*, 488 F.2d 65 (5th Cir. 1974) (I.N.S. Border Patrol); *United States* v. *Sicilia*, 475 F.2d 308 (7th Cir.), cert. denied, 414 U.S. 865 (1973) (FBI); *United States* v. *Sosa*, 469 F.2d 271 (9th Cir.), cert. denied, 410 U.S. 945 (1973) (U.S. Customs); *United States* v. *Thomas*, 475 F.2d 115 (10th Cir. 1973) (U.S. Marshal); *United States* v. *Fish*, 432 F.2d 107 (4th Cir. 1970). However, not one of these cases even refers to internal regulations of law enforcement agencies, except one, *U.S.* v. *Bradley, supra.* In *U.S.* v. *Bradley, supra*, the appellant claimed that Post Office regulations were violated, but failed to cite any specific regulations to the Court. Indeed this Court expressed doubt as to whether any such regulations existed, but even if such regulations did exist, the Court determined that they were not applicable. Here, on the other hand, there is no doubt as to the existence of IRS regulations governing the conduct of criminal investigations. Additionally, all of the cases cited in this note are cases where the appellant sought to apply *Miranda* to non-custodial interrogations. Leonard's position in the instant case, however, is not that the IRS was required by *Miranda* to give constitutional warnings, but that the IRS was required to give such warnings by its own internal regulations. This distinction is the reason Leonard did not cite *U.S.* v. *Dickerson*, 413 F.2d 1111 (7th Cir. 1969), a case which did apply *Miranda* to non-custodial interrogation by Special Agents of the IRS, a position previously rejected by this Court. See *U.S.* v. *Driscoll*, 399 F.2d 135 (2nd Cir. 1968).

the conduct of criminal investigations. First, as the Seventh Circuit stated in *U.S.* v. *Sicilia*, 475 F.2d 308 (7th Cir.), *cert. denied*, 414 U.S. 865 (1973):

> "In general, special agents are concerned with criminal investigations. On the other hand, the audit type of investigations are handled by revenue agents with no particular contemplation of criminal prosecution. There, therefore, is considerable potential for the taxpayer being misled as to the nature of the investigation. In the case of the F.B.I. agents, they are ordinarily associated in the public view with criminal investigation. Specifically in the present case there was no ambiguity in the investigative call on Sicilia—the agents were out to catch a thief." *Id.* at 310.

Additionally, the IRS has publicly stated that it would advise taxpayers who are the subject of criminal investigations of that fact and indeed common sense suggests that taxpayers and certainly their lawyers and accountants have relied on those representations in dealing with an IRS Revenue Agent conducting an audit.*

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* The government implicitly contends that Leonard was not prejudiced by the failure of agent Laski to give warnings required, since, it claims, Leonard was represented by counsel throughout the investigation (G. Br. 21). This claim is totally inaccurate. Indeed, Laski's daily activity record indicates that when Laski made his initial contact with Jacob Lefkowitz, Esq., Lefkowitz told him explicitly "I am not his attorney in this matter." (A. 434a). Lefkowitz, an attorney, should not be confused with Leonard's accountant, Edward Leskowicz, of the firm of Leskowicz, Brower & Driver. Lefkowitz, the attorney, was representing Leonard in connection with challenges Leonard had made to IRS determinations for the years 1961-1964, which were then pending in the Tax Court. [It should be noted in this regard that agent Laski during his interview by defense counsel on January 6, 1975 and/or the court reporter who transcribed it, confused the two and indicated "Lefkowitz" when Laski was obviously referring to the accountant Leskowicz (A. 89a, 91a, 93a, 103a).] Thereafter, Laski contacted Leonard's accountant, Edward Leskowicz, and never contacted Lefkowitz again (A. 434a). Notwithstanding, the government seeks to create the impression that Leonard was "attended" by numerous attorneys (G. Br. 22-23).

(*footnote continued on following page*)

Consequently, this Court should reverse Leonard's conviction and dismiss the indictment, since it was the product of illegally obtained evidence. Alternatively, at the very least, the Court should suppress the Swiss Bank affidavit and all statements and information given by Leonard and should grant Leonard a new trial.

6. The statements made by Leonard, without benefit of the required warnings, were not voluntary and, in any event, the jury was not properly instructed.

Prior to trial, Leonard sought to suppress his statements and the affidavit given to Agent Laski during the investigation on the ground that, since Laski was conducting a criminal investigation under the guise of a routine audit, he had been misled (A. 434a-436a). The Court however denied the motion (A. 16).

The government asserts that Leonard's statements and affidavit were "wholly voluntary" since, it claims, "no deceit was practiced upon [Leonard] at any time" (G. Br. 32). This contention is without merit.

As noted previously, the IRS was required to represent to the Post Office that it was conducting a criminal investigation. Therefore, Laski's investigation was hardly a "routine" audit, despite the fact that his title "Revenue Agent" necessarily implied to Leonard that it was.*

(*footnote continued from preceding page*)

The record merely indicates that, during his investigation, Laski raised a question about some Canadian stock and as a result Leskowicz on one occasion submitted an opinion of counsel to the effect that since the stock had no value at the time of receipt, it was not reportable on Leonard's 1967 tax return (A. 359-360). Subsequently, in May, 1969, Leskowicz obtained another opinion of counsel as to what was necessary to be included in Leonard's 1968 return which had not yet been filed (GX 102 at E 497). Most importantly, however, Leonard was not represented by counsel during the course of Laski's investigation and certainly not when interviewed by Laski in March 1969 (A. 206).

* Leonard was audited frequently by Revenue Agents in the past and therefore must have considered this audit, like the others, as "routine".

In his motion to suppress below, Leonard's counsel specified precisely how Leonard had been misled:

> "Mr. Tigue: I think there is a valid distinction between compliance with the press release on one hand and on the other hand the government using stealth and trickery to put in a person who is really not in the capacity he is alleged to be.
>
> Mr. Laski walked in and said, 'This is a normal audit,' when in fact it was a criminal investigation.
>
> So I think [the statements should be suppressed for] twofold [reasons]. One, it is a situation where the government does put in a Trojan horse and, two, it is the lack of warning.
>
> The Court: Well, what is your position with regard to what Mr. Leonard understood the investigation to be at the time he gave the statements?
>
> Mr. Tigue: If he gave the statements [under the impression] that it was a normal everyday audit that was being conducted of his income tax returns, which was not the case at all [then the statements should be suppressed]".
>
> * * *
>
> Mr. Laski did precisely what his job was. He came in as a Trojan horse. He gathered together a bunch of information and he [then] participated in the referral to the special agents for prosecution, and I think that should be condemned under the circumstances." (A. 434a-436a)

In short, Leonard clearly stated his position that the allegedly incriminating statements made to Laski were obtained by trickery. At the conclusion of the trial, Leonard therefore requested that the jury be specifically instructed on the "alleged[ly] incriminating statement[s] claimed to have been made by the defendant outside of Court" (A. 57a; Defendant's Request No. 19 "Admissions"). The Court, however, refused to give the requested instruction (A. 833).

Even though Leonard did not specifically direct the Court's attention to the requirement of 18 U.S.C. § 3501, the failure of the court to properly instruct the jury on Leonard's allegedly incriminating statements constituted "plain error." *U.S.* v. *Barry,* —— F.2d —— (2d Cir. Dkt. #75-1060—decided June 18, 1975).

In *Barry,* this Court reversed the conviction "on the district judge's failure to charge the jury to weigh [the defendant's] admissions in light of all the surrounding circumstances, . . . an instruction mandated by 18 U.S.C. § 3501". *Id.* at 4121.* The Court explicitly held "that the failure so to charge is plain error", *Id.* at 4125, despite the fact that defendant failed below to "state distinctly the matter to which he object[ed]". Fed. R. Crim. Pr. 30. *U.S.* v. *Bynum,* 485 F.2d 490, 503 (2d Cir. 1973) *vacated on other grounds,* 41 L Ed 2d 209 (1974). The Court reversed because "the statutory direction that the judge '*shall* instruct the jury' [is an] imperative [which] is not qualified." *Id.* at 4123 [Emphasis in the original].

This Court found "sufficient prejudice" in *Barry* to justify vitiating the jury's verdict, because the defendant's incriminating statements were an important link in the government's evidence. *Id.* 4127-4128. Indeed, this Court stated "a court should be more quick to perceive prejudice 'where the departure [by the trial judge] is from a constitutional norm or a specific command of Congress'" *Id.* at 4127.

In the present case, Leonard's statements and the affidavit given to Agent Laski were extremely damaging. Since the jury was not properly instructed, Leonard's conviction should be reversed. *Barry, supra.*

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* In *Barry,* the defendant claimed that his incriminating statements had been coerced. However, it does not matter whether such statements are products of duress or deceit; in either case, the statements are not voluntary and therefore are suppressible. Cf. *Miranda* v. *Arizona,* 384 U.S. 436 (1966).

POINT II

The unlimited scope of the FBA project mail watch, conducted by IRS Agents, constituted a violation of the Post Office regulations.

Leonard squarely raised and never abandoned the issue of the legality of the mail watch. Any contrary contention is totally inaccurate.

The Customs cases cited by the government to justify the broad scope of the FBA project mail watch are irrelevant because they involve the exercise by Customs Agents of statutory and constitutional authority to conduct border searches.

The illegal mail watch tainted the entire investigation of Leonard.

1. The unlimited scope of the FBA project mail watch, conducted by IRS Agents, constituted a violation of the Post Office regulations.

The government's brief carefully refrains from responding to appellant's argument that the unlimited scope of the FBA project mail watch (in which all mail from Switzerland, lacking a return address, was intercepted and microfilmed over two four-month periods in 1968 and 1969) was improper under then current Post Office regulations.

As noted in the appellant's brief in chief (A. Br. 33-35), the Post Office regulations simply do not authorize such a "dragnet" approach, but require "specificity" as to each mail cover subject for whom a law enforcement agency requests a mail watch. Part 861.42b., *Post Office Manual*. Here, literally thousands (if not hundreds of thousands) of Americans had their mail from Switzerland photographed, where the government, prior to the mail watch had absolutely no reason to believe that such persons were committing or attempting to commit a crime (A. 379a). Part 861, *Post Office Manual*. The government therefore appears to concede that the mail watch utilized in the FBA project violated Post Office regulations.

2. Leonard never abandoned the issue of the legality of the mail watch.

While the government never addresses itself to the issue of whether the broad scope of the FBA project mail watch violated Post Office regulations, it nonetheless contends that Leonard "abandoned" the issue of the legality of the mail watch (G. Br. 40). This claim is totally without merit.

The first time that Leonard's counsel learned that the IRS investigation of Leonard was an FBA project case was on January 6, 1975, when Laski revealed it during his interview (A. 316a-317a). The very next day, January 7, 1975, counsel immediately brought this to the attention of the court (A. 317a), and, since the case was to be tried the following day, made an oral motion because he had not "had time to type it up" (A. 316a).

The oral motion to suppress Leonard's statements and affidavit given to agent Laski was based on two arguments; first, that by conducing a criminal investigation, Laski was performing the function of a Special Agent and therefore, by IRS regulations, was required, but failed, to give Leonard specified warnings* and,

> ". . . secondly, the problem here, I believe is that there is a strong indication in this case that the case resulted from what I would regard as and would hope to establish to the Court as an illegal mail cover or mail watch." (A. 318a).

At this stage, however, counsel was not sure that Leonard was actually the subject of a mail cover, since the government specifically blocked questions at Laski's interview that would have elicited this information (A. 122a, 123a.)** He therefore requested Judge Owen for an order instructing the government, pursuant to the "Judge Otto Kerner" case [*U.S.* v. *Isaacs,* 347 F. Supp. 743 (N.D. Ill. 1972)], to inform him whether there was a mail cover (A. 320a-321a, 33a).

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* See Point I, *supra.*

** See Point IV, A. Br. 48-52.

When the Court asked "that Leonard here be informed as to whether there was a mail cover and the details of it", the government responded as follows:

> "Mr. MacDonald: I am prepared to inform the court, I hope in helpful fashion, certainly not to the detail and to th[e] extent that the judge in Illinois asked for information. I have in my possession photostats or photographs of half a dozen envelopes addressed to Mr. Leonard both at his home and his home at Union Plaza. I will make those available to counsel.
>
> "I am informed that those were made back in 196— well, the time I am uncertain about. I think in the early months of 1968 and 1969 *by the postal authorities*, that is, the mail was passing through on the way to being delivered to Mr. Leonard." (A. 333a-334a) [Emphasis added]

The government then mentioned for the first time that there was an informant's report concerning the Treadwell payments and further that the mail watch "kicked out" information "at the same time" concerning Leonard's having correspondence with Swiss banks (A. 334a). However, at this point the government's disclosure was very limited; it merely confirmed that there had been a mail watch, while not disclosing its extent. Moreover, the government's statement that the photographs of the "half a dozen" envelopes were made "by the postal authorities" was ultimately established as inaccurate. In any event, the court scheduled a hearing for three days after, January 10, 1975 at 10:00 A.M.

Leonard immediately prepared subpoenas *duces tecum* for service on the District Director of the IRS, the Regional IRS Commissioner—New York and Regional Counsel, New York, and the Secretary of State and Swiss Desk Officer, returnable on January 10th, the day the hearing was then scheduled (A. 419a, 389a).

However, on the following day (and in fact on less than a half a day's notice (A. 389a), the government expedited the hearing date to that very afternoon, January 8, 1975, at which time the government called its one witness, Revenue Agent Bernard Morris, to testify about the "essentially

civil nature" of the FBA project. In the middle of Morris' direct testimony, the government addressed itself to the "mail watch" issue.

> "Mr. MacDonald: Your Honor, although your Honor did not actually decide whether the hearing was appropriate with respect to the mail cover allegations that were discussed yesterday, this witness is able to give your Honor an eyewitness account of at least one such session, and we would just ask leave of the court to pursue that and offer some helpful testimony, we believe." (A. 375a)

Thereafter, Morris revealed that there had been a massive mail watch, in which all envelopes from Switzerland arriving at Kennedy Airport and lacking a return address were microfilmed by Special Agents of the IRS (and not "by postal authorities" as previously represented) on machines which photographed 3,600 envelopes an hour (A. 375a-381a). It was at this point, for the first time, that the unlimited nature of the mail watch was disclosed.

During the colloquy that followed the same day, defense counsel (who—it must be emphasized—was called to this hearing on very short notice) explicitly reserved his claim of "whether [the FBA project mail watch] was conducted properly" (A. 390a). The record demonstrates that Leonard's counsel expressly reserved this point:

> "I don't know if [the mail watch] complies with their [i.e., Post Office] regulations—we have to research that—in the Post Office to permit the IRS special agents to come in, take the mail out of its ordinary course, bring it into a separate room, photograph it and return it on its way.
>
> "[After also citing 18 U.S.C. § 1702] I think the whole mail watch and anything that flowed from that are suppressible". (A. 429a)

The court, which held the "hearing on what [it] regard[ed] as the most informal of bases" (A. 419a), thereafter ruled from the bench that "there was no interference with the flow of mail at all" (A. 423a), thus foreclosing

Leonard from arguing the issue further.* The government's contention that Leonard "abandoned" any claim with respect to the legality of the mail watch is therefore totally inaccurate.

3. The Customs cases cited by the Government to justify the broad scope of the FBA project mail watch are irrelevant because they involve the exercise by Customs agents of explicit statutory and constitutional authority to conduct border searches.

The government has mischaracterized Leonard's position on the *Costello* case.

Citing a series of Customs cases,** the government contends (without regard to the Post Office regulations) that the unlimited scope of the FBA project mail watch conducted by IRS agents was constitutionally justified. This contention is without merit.

The Customs cases cited by the government are irrelevant to a mail watch conducted by IRS agents. Customs agents have unique and specific statutory authority to conduct border searches, including the explicit right to search "any [foreign origin] envelope, wherever found". 19 U.S.C. § 482. See also 39 U.S.C. § 3623(d); 39 C.F.R. § 61.1; 19 C.F.R. § 162.6. But even this statutory authority is limited and requires that Customs agents, before inspection, "have reasonable cause to suspect there is [contraband or dutiable goods]". Further the Customs regulations prohibit the reading of correspondence contained in sealed letter mail of foreign origin unless a search warrant has been first obtained. 19 C.F.R. § 145.3.

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* The government has cited the Code of Federal Regulations for the present Postal Regulations at G. Br. 33 and 47. It should be noted that these regulations governing authorizations for mail covers were published in the Code of Federal Regulations *for the first time* at 8:45 A.M., March 11, 1975, four days after Leonard had been sentenced. However, as the present regulations explicitly state, the old Post Office regulations, current in 1968 and 1969, governing mail covers were never so previously published. See 39 C.F.R. § 233.2.

** *U.S.* v. *Odland*, 502 F.2d 148 (7th Cir.), *cert. denied*, 419 U.S. 1088 (1974); *U.S.* v. *Francis*, 487 F.2d 968, 972 (5th Cir. 1973), *cert. denied*, 416 U.S. 908 (1974); *U.S.* v. *Swede*, 326 F.Supp. 533 (S.D.N.Y.).

The Supreme Court has indicated in dictum that customs searches and seizures (to collect duties and to bar entry of contraband) were constitutionally unique and were not intended to be "embraced within . . . the [Fourth] Amendment." *Boyd* v. *U.S.*, 116 U.S. 616 (1885).

In the present case, however, the mail watch was conducted not by Customs agents but by Special Agents of the IRS who lacked any such statutory or constitutional authority and who further lacked any reasonable basis for believing that all American recipients of mail from Swiss banks were committing or attempting to commit a crime.

Nonetheless, the government contends that the FBA project mail watch was proper under *U.S.* v. *Costello,* 255 F.2d 876 (2nd Cir. 1958), and argues that *Costello* "should not now be overruled" (G. Br. 40). This latter contention is a strawman argument; Leonard does not argue that *Costello* was wrong, only that the selective mail watch of one specific person approved in *Costello* is completely distinguishable from the unlimited FBA project mail watch in the present case in which all air mail from Switzerland, lacking a return address, was microfilmed.

Costello was grounded on the defendant's failure to show that there had been a substantial delay in the mail or that any laws had been violated. Here, however, (as the government apparently concedes) the unlimited scope of the mail watch violated Post Office regulations.

Most importantly though, the government never established, as required by Costello, that there had been no delay in Leonard's mail. The only witness called by the government, Revenue Agent Morris, merely viewed the mail watch on one occasion (A. 396a) and therefore lacked personal knowledge as to whether Leonard's mail (as opposed to the mail of some others) had been delayed. His hearsay testimony of what the IRS "sought" to do cannot be a sufficient substitute for direct proof of what actually occurred.

4. The illegal mail watch tainted the entire investigation.

The government further claims that "Leonard failed to refer this Court to any authority suppressing mail cover evidence" because such authority as exists "points the other way", citing *U.S.* v. *Schwartz,* 176 F.Supp. 613

(E.D.Pa. 1959), *aff'd on other grounds,* 283 F.2d 107 (3rd Cir. 1960). A reading of the *Schwartz* case, however, demonstrates that it supports, rather than undermines, Leonard's position.

There were two mail watches in *Schwartz;* while the first mail watch was proper under the then current Post Office regulations, the second violated those regulations. The Court stated the following about the second, improper mail watch:

> "Testimony taken at the hearing disclosed that in the investigation by the Postal Inspector at the Hamilton Court Hotel there was definitely overzealousness on the part of the investigator. Were it not for an important fact to be set out hereafter, *the Court would have no hesitancy in suppressing the evidence obtained at the Hamilton Court Hotel* because of unlawful search and seizure of the defendant's mail and telegraphic communication at that address. [Emphasis added]
>
> "That question, however, is moot because it was developed at the hearing that *all evidence* which was used by the Government to secure the present Indictment was obtained from 17 persons whose names and addresses were first obtained by the Clerk at the General Post Office in the [proper] 'mail watch' above described." *Id.* 614 [Emphasis in original]

In short, the issue in *Schwartz* was the question of "taint"—i.e., whether the illegality of the second mail watch tainted the case, a doctrine later characterized by the Supreme Court as "fruit of the poisonous tree". See *Wong Sun* v. *U.S.,* 371 U.S. 471 (1963).

As the Court in *Schwartz* stated, it "would have [had] no hesitancy in suppressing the evidence" based on the violation of the Post Office regulations; it declined to do so because the indictment was based on evidence entirely obtained from the first [i.e. proper] "mail watch". *Id.* at 614.*

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* The government contends that the Fraud referral report, annexed as an Addendum to its brief, establishes that Leonard's indictment was untainted by the FBA project because the report

(*footnote continued on following page*)

In the present case, the FBA mail watch violated Post Office regulations and "the fruits" thereof should be suppressed and the indictment dismissed. Alternatively, the Swiss bank affidavit and all statements and information supplied as a result of the mail watch should be suppressed and Leonard granted a new trial.

POINT III

The Swiss bank affidavit was not properly admissible as a "similar" false statement act because it was not literally false.

Eva Brooke's testimony as to what Leonard said in 1971 was offered by the government on the issue of the alleged falsity of Leonard's 1971 tax return and lacked probative value as to the truth of the 1969 Laski affidavit.

The Swiss bank affidavit was not admissible as a false exculpatory statement since it had no tendency, even when given, to exculpate Leonard from the charges in the indictment.

In any event, the government's proof failed to meet the requisite legal standard of "plain clear and convincing" evidence.

1. The Swiss bank affidavit was not a "similar" false statement act because it was literally true.

The Swiss bank affidavit reads as follows:

> "(1) I do not now and I have not had any foreign bank accounts;" and
>
> "(2) I have not had any transactions or dealings of any nature with any foreign banks or other representatives except for (specified loans in Australia and currency conversions.)" (GX. 74 at E 281).

(*footnote continued from preceding page*)

contains only two innocuous references to the fact that Leonard was part of the FBA project (G. Br. 27). However, not only do these references indicate that the IRS had information that Leonard had a Swiss bank account, but also the report contains a statement that "Taxpayer claims to have only *one* bank account" [Emphasis in original] Addendum p. 2, G. Br. Consequently, the fact that Leonard was part of the FBA project undoubtedly had an effect on the decision to proceed criminally in this case.

The government concedes that Laski drafted the body of paragraphs (1) and (2) (G. Br. 26). However, the government asserts that someone other than Laski added at least one, if not both, of the exclusions in paragraph (2), relating to specified loans in Australia and currency conversions. There is not only no evidentiary support for this assertion, but the testimony at trial, as well as Laski's pretrial interview, tends to indicate that Laski was the responsible person* (A. 102a-103a, 211-212, 347-348).

In any event, regardless of whether agent Laski dictated merely one or both of the exclusions, the fact remains that it was the body of paragraph (2) that the government claimed was false (A. 497-501). Specifically, the government at trial and particularly during its summation alleged that the falsity of the affidavit lay particularly in the words "any transactions or dealings". GX 74 at E 281 (A. 948-49).

The government contends that the $383,000 received by Leonard in 1968 from Chase Manhattan in the form of its own "official" checks established that Leonard had "dealings" or "transactions" with a foreign bank. It also makes the argument that Eva Brooke's testimony to the effect that Leonard said in 1971 that "I have [a Swiss bank account]" was proof that Leonard had such an account two years earlier.** These contentions are without merit.

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* What Laski did say, when questioned about the affidavit, was:

"Q. Did there come a time when you asked Mr. Leonard to supply you with an affidavit regarding foreign bank accounts?

"A. Yes.

Q. How did that come about?

* * *

"A. We were asked by the project manager [i.e. Morris] to get an affidavit from the taxpayer stating that he had no foreign bank accounts or business dealings with foreign banks.

I requested Mr. [Leskowicz] to see that I got the statement; *I dictated the paragraphs I wanted and Mr. Leskowicz* saw [that] the affidavit came forth."

(A. 102a-103a) [Emphasis added].

There were only two paragraphs in the affidavit. GX 74 at E 281.

** The government represented to the court at the beginning of the trial that it would "prove that Mr. Leonard admitted control over a number of Swiss bank accounts of his own *during the relevant period* and that, when circumstantially coupled with the

(*footnote continued on following page*)

Leonard's receipt of the Chase Manhattan Bank checks in New York was a direct "dealing" or "transaction" with a domestic bank (Chase Manhattan Bank), and not a Swiss bank. There was no proof offered by the government that Leonard even knew that Chase had paid the money at the direction of a foreign bank, let alone that Leonard was the source himself. At most, the checks constituted an "indirect" dealing with a Swiss bank, but the government conceded in its summation that the Laski affidavit did not address itself to indirect transactions—i.e. "it doesn't say anything about . . . indirect dealings with foreign banks" (A. 949).

Eva Brooke's testimony as to what Leonard might have said in 1971 is simply not proof that Leonard had a Swiss bank account "in the relevant period", two or three years earlier in 1968 or 1969, or that the affidavit Leonard signed in 1969 denying then having such an account was untrue. GX 74. ¶ 1. More particularly, the record is clear that, according to Eva Brooke, Leonard was relating facts only as of 1971 and not as of 1968 or even 1969:

> "Q. And would you tell the jury what, if anything, you recall, in regard to the 50,000 Swiss bank portion of the proposal, was said concerning the opening of such an account and— A. Well, my husband and I— *I recall we were talking socially then, it was not business.* We were interested in how a Swiss bank account was got, and so Mr. Leonard, as I remember, was evasive about how to get one, but he did in fact say, 'I have one.'

(*footnote continued from preceding page*)

receipt of $383,000 [from] . . . the Banque Cantonale of Zurich, establishes . . . [that it was his] numbered account in that very bank." (A. 65). [Emphasis added] This representation, on the basis of which the court permitted the government to mention the Swiss account in its opening, was inaccurate in two respects. Eva Brooke never testified that Leonard admitted "control over a number of Swiss bank accounts" and further that he had such an account "during the relevant period"—i.e. 1968 or 1969. (A. 510-513). See *infra*. Additionally, if the government is correct in its argument that the court did exercise its discretion *prior to the admission* of this similar act proof (G. Br. 49-51), then it did so one the basis of inaccurate representations as to what the proof would show.

Q. Do you recall if he said—

Mr. Tigue: 'I have'—[?]
The Court: 'I have one.'
Mr. Tigue: 'I have one?'
The Witness: 'I *have* a Swiss bank account.'
Mr. Tigue: 'Thank you.'" (A. 511-512 [Emphasis added]

More importantly, however, the government offered Eva Brooke's testimony simply as proof that the denial of a foreign account in Leonard's 1971 return was untrue. Indeed, to drive this point home to the jury, immediately following Eva Brooke's direct testimony and even before cross-examination began, the government introduced Leonard's 1971 tax return and then read to the jury Leonard's denial of "any interest in . . . a bank account in a foreign country"* (GX 83, at E-373, A. 524).

The argument that Eva Brooke's testimony was relevant to whether Leonard had an account in 1968 or 1969 is an afterthought. The government argued in its summation only that the $383,000 in Chase Manhattan Bank checks were evidence that the Laski affidavit was false, since (according to the argument then made) Leonard "should have disclosed" indirect transactions with a foreign bank (A. 949).

2. The Laski affidavit was not a false exculpatory statement.

The government also contends that the Laski affidavit was "obvious[ly] admissible" as a "false exculpatory statement" (G. Br. 48). This claim is frivolous.

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* Additionally, Eva Brooke's testimony and Leonard's 1971 tax return (filed in 1972) were simply too remote in time to be probative of whether Leonard had wilfully subscribed his 1967 and 1968 tax returns knowing that they omitted material amounts. See *United States* v. *Ring*, 513 F.2d 1001 (6th Cir. 1975) [reversing a conviction on the improper admission of alleged similar acts, where the alleged "similar acts" were "not reasonably close in time" and not sufficiently similar]. See also *United States* v. *Nemeth*, 430 F.2d 704, 705 (6th Cir. 1970); *Whaley* v. *U.S.*, 324 F.2d 356, 358 (9th Cir. 1963), *cert. denied*, 376 U.S. 90 (1964).

Exculpatory statements made by a defendant to government agents investigating a crime which is the subject of the indictment, when proven to be false, are circumstantial evidence of guilty consciousness and have independent probative value. *U.S.* v. *Smolin,* 182 F.2d 782, 785-86 (2d Cir. 1950); see *U.S.* v. *De Alesandro,* 361 F.2d 694 (2d Cir. 1966).

However, the indictment in this case charged Leonard with subscribing tax returns which omitted specific Treadwell checks. The indictment by its terms had nothing to do with the subject matter of foreign bank accounts or the affidavit. Therefore, the Laski affidavit (assuming for the moment that it was untrue) could not even theoretically have been a false exculpatory statement, since when given it had no tendency to exculpate Leonard from the charges in the indictment.*

3. The government's proof failed to meet the requisite legal standard.

The government claims that the "plain, clear and convincing" standard for admissibility set forth in *U.S.* v. *Lawrence,* 480 F.2d 688, 691-692, n. (5th Cir. 1973) and *Kraft* v. *U.S.,* 238 F.2d 794, 802 (8th Cir. 1956) is a "strawman" which is "irrelevant" because the court found a "square conflict" between the Laski affidavit and the Chase Manhattan checks. G. Br. 54-55. However, as noted, the Laski affidavit was never proven to be literally untrue. Consequently, the government's proof failed to meet the requisite legal standard, and Leonard's conviction should be reversed and a new trial granted.

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* The court's comment that "if the government fails in demonstrating [that] the statement is false and exculpatory then they have fallen on their face and that's the end of it." (A. 12) is not what happened below. The $383,000 in Chase Manhattan Bank checks and Eva Brooke's testimony as to what Leonard had said two years after signing the Laski affidavit undoubtedly created sufficient prejudice that the jury improperly concluded that there was "fire", when there was only "smoke".

POINT IV

Leonard was denied a fair trial because:

(1) The government obstructed his interviews with prospective witnesses who voluntarily made themselves available: the government's present justification is totally without merit and is a recent afterthought; and

(2) The government improperly used a Letter Rogatory to convince a key witness, Eva Brooke, a British citizen, to travel to New York to testify upon the false representation that she was otherwise subject to "extradition and arrest" in England where she resided, facts which were first disclosed on this appeal.

1. The government's present justification for obstructing Leonard's interviews of witnesses who voluntarily made themselves available is frivolous and a recent afterthought.

The government contends that since it is "not required to submit [government employees] to pretrial interview", the defendant was "aided" by such partial interviews as were granted. The government also contends that various statutes prohibited the pretrial interviews (G. Br. 59-61). These contentions are frivolous.

First, the defendant has never contended that *the government* was required to submit prospective witnesses for pretrial interviews. Leonard, however, wrote each of seven specific prospective witnesses and asked that they make themselves available for interview. All seven thereafter voluntarily did so. After the witnesses chose to make themselves available, it was completely improper for the government to have interfered with the interviews. *U.S.* v. *Matlock*, 491 F.2d 504 (6th Cir. 1974); *U.S.* v. *King*, 368 F. Supp. 130 (M.D. Fla. 1973); *Johnston* v. *NBC*, 356 F. Supp. 904 (E.D.N.Y. 1973); *Coppolino* v. *Helpern*, 266 F. Supp. 930 (S.D.N.Y. 1967); *Gregory* v. *U.S.*, 369 F.2d 185 (D.C. Cir. 1966).

The obstruction by the government took a number of different forms. At the outset, even though the interviews

were not to be civil depositions, the government insisted that the interviews be recorded by a court stenographer and Leonard consented (A. 477a-479a). Thereafter, the government instructed witnesses not to answer questions where its objections were limited only to the form of the question (E.g. A. 108a-109a, 113a-115a, 123a, 125a, 127a, 165a). Indeed, if the interviews were depostions taken for a civil case, such technical objections would not justify an instruction to the witness not to answer. Rule 30(c), F.R. Civ. Pr.

Second, when the government permitted at least one of the interviews to develop to a stage where Leonard's appetite had been whetted by the limited information that was disclosed (see Schulman interview quoted at A. Br. 49-50), the government then insisted that if Leonard wanted further information he could obtain it at a price—the price being the waiver of his Fifth Amendment privilege. Indeed the government stated the choice in dramatic terms:

> "Mr. MacDonald: Great. If and when you want to tender his box and stop claiming the Fifth on all of the evidence he possesses, then I will change the rules . . . (A. 244a)"

In short, the government offered Leonard unfettered access to the prospective witnesses on condition that he waive his Fifth Amendment privilege and "tendered . . . all the evidence he possesse[d]", a Hobson's choice not unlike that disapproved by the Supreme Court in *U. S.* v. *Marchetti*, 390 U.S. 39 (1968) and *Grosso* v. *U. S.*, 390 U.S. 62 (1968).

Additionally, the statutes cited by the government, 18 U.S.C. § 1905 and 26 U.S.C. § 7213(a), prohibit disclosure by government agents of information they obtained except "as provided by law" or as "authorized by law". The right of a defendant to conduct pretrial interviews of prospective witnesses who have voluntarily made themselves available for questioning, without prosecutorial interference, is clearly "provided by law", *U. S.* v. *Matlock, supra; U. S.* v. *King, supra; Johnston* v. *NBC, supra; Coppolino* v. *Helpern, supra*, if not "authorized by" the Due Process clause. See *Gregory* v. *U. S., supra.*

Furthermore, the purpose of the statutes cited by the government is to prevent "disclosure of confidential information" about a citizen obtained by a government agent "in the course of his . . . official duties." 18 U.S.C. § 1905. See also 26 U.S.C. § 7213(a) which explicitly prohibits IRS agents from disclosing "the amount or source of [a taxpayer's] income, losses, expenditures etc." The government's argument that these statutes thereby prevent Leonard from obtaining disclosure of information obtained by the government about him is to turn the statutes' purpose on its head; it is tantamount to arguing that a statute designed to be a shield for the protection of a taxpayer's privacy can be used by the government as a sword to prevent him from discovering the information the government actually has. This is certainly not the purpose contemplated by either 18 U.S.C. § 1905 or 26 U.S.C. § 7213(a).

2. The government improperly used a Letter Rogatory to convince Eva Brooke, a British citizen, to travel to New York to testify, upon the false representation that she was otherwise subject in England to "extradition and arrest". In addition, the government improperly failed to disclose these circumstances at trial.

Leonard alleged that the government improperly conducted *ex parte* discussions with the court concerning a "Letter Rogatory [Request] to the Appropriate Judicial Authority" in London, England to compel Eva Brooke to travel from England to testify in New York at trial (A. Br. 55). The government made no specific response to this claim except to note some dictum from *U. S.* v. *Braasch*, 505 F.2d 139, 149 (7th Cir. 1974) concerning the continuance aspect raised by Leonard as well (A. Br. 52). See G. Br. 65.

A "letter rogatory" is a judicial request "addressed to a foreign court that a witness be examined within the latter's terri[torial] jurisdiction by written interrogatories, or, if the foreign law permits, by oral interrogatories." Ballentine's Law Dict. (3d ed. 1969) pp. 726-727. *Volkswagenwerk A. G.* v. *The Superior Court of Sacramento County*, 109 Cal. Rept. 219, 33 CA 3d 508 (1973). The pur-

pose of a letter rogatory is simply to provide a means for taking the testimony of a witness abroad. *U. S.* v. *Reagan*, 453 F.2d 165 (6th Cir. 1971), *cert. denied*, 406 U.S. 946 (1972).

Because a Letter Rogatory is a request from one nation to another for assistance in exercising the judicial power of the requesting nation, protocol requires, and 28 U.S.C. § 1781 provides, that a Letter Rogatory be transmitted to the judicial authority of the foreign nation. Since an order of a United States court requiring a person to give testimony has no extra-territorial effect, it is highly improper to seek, as appellant will show the government apparently did herein, to directly serve a foreign citizen in a foreign nation, rather than to have the appropriate foreign judicial official effect service on the witness.

The Letter Rogatory in the instant case was both improperly served (see *infra*) and used for an improper purpose (A. 448a-451a). The Letter Rogatory here stated that the court below had been informed by the government that Eva Brooke, a British citizen, "presently residing in London at an address known to the U.S. government" had admitted to "representatives of the United States" that "the defendant Leonard had made incriminating statements to her" but that "even though she was previously served with a subpoena requiring her attendance as a witness . . . in this present case, she . . . has *resisted* coming to New York . . . though the United States has agreed to bear all her reasonable travel expenses" (A. 450a) [Emphasis added].

The court below thereafter requested that the English court "enter an order" compelling her to travel to New York "as soon as physically possible" to testify at the trial. The Letter Rogatory further requested that the English court take "such other steps (such as *arrest* and *extradition*) that may be necessary to secure compliance with such orders" (A. 450a-451a). [Emphasis added]

The only English authorities explicitly relied on in support of this extraordinary request (compare 28 U.S.C. §§ 1781-1783, 1696), the Foreign Tribunals Evidence Act of 1856 and the Extradition Act of 1870, are completely

irrelevant. The Foreign Tribunals Evidence Act of 1856 covers only civil matters and simply gives English courts the power to take *testimony in England* at the request of a foreign court. The Extradiction Act of 1970 merely permits the *taking of testimony* for a criminal case pending in a foreign court in the same manner as provided by the Foreign Tribunal's Evidence Act of 1856. In short, neither Act cited in the Letter Rogatory supported the request. Indeed, both Acts establish that the request inherently lacked merit, which tends to indicate that it was designed for a completely different purpose.

Moreover, there is no proof that the government properly filed the Letter Rogatory in any English court. Indeed, it is quite likely that the government, fully aware of the improper request contained in the Letter Rogatory, never intended to seek the aid of an English court, but instead served it on Mrs. Brooke directly, realizing that she would not know it was improper and would be intimidated into abiding by its terms.

If this was indeed the case, then Leonard suffered substantial prejudice. The government's contacts with the court on the Letter Rogatory were during the trial* and were *ex parte* and concealed from Leonard until this appeal. When the existence of *ex parte* conferences came to Leonard's attention below, he specifically asked whether he would learn about them and the court remarked that it "assume[d] at some point that may occur" (A. 238-239). There was no legitimate prosecutorial or judicial reason for this *ex parte* procedure.

Second, the lengths the government went to in order to obtain the presence of Mrs. Brooke in New York must have seriously concerned her. Indeed, despite the fact that she claimed to be an old and dear friend of the Leonard family (A. 528, 555), she apparently was so intimidated by these events that she did not call Leonard when she arrived in New York to inform him, simply as a matter of courtesy, that she was to be a witness (A. 570-571). This

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* The Letter Rogatory was signed by the court on January 14, 1975. Trial began January 13.

was hardly the normal reaction of a friend of 25 years who voluntarily said that the Leonards "have always been kind and friendly towards me" (A. 528, 555, 570).

The government's efforts to obtain her presence demonstrate that Mrs. Brooke was an important witness. In fact, her testimony was extremely damaging to Leonard. It was, therefore, clearly significant that her presence, if not her testimony, was colored by the government's statement that she was subject to "arrest and extradition" even in England.

In any event, especially since Mrs. Brooke was recently widowed and therefore vulnerable, this was certainly the type of information which the government should have disclosed to the defendant. See *Brady* v. *Maryland*, 373 U.S. 83 (1963).

Consequently, Leonard's conviction should be reversed and a new trial ordered.

POINT V

The government never proved that the Treadwell payments were omitted from Leonard's 1967 tax return.

The allegedly omitted amounts were payments made to Leonard by Treadwell, not by UCC. They therefore were not includible in the UCC component of the gross receipts in Schedule C, since that component consisted exclusively of net payments received from UCC.

Leonard never told Agent Laski that he had not received "any of the 10% payments."

1. The government never proved the Treadwell payments were omitted.

The government mistakenly contends that since the Bardes draft of the 1967 return contained a "UCC component" of $291,000 (GX 92 at E-40), the government sufficiently established that $24,168 in payments from Treadwell were omitted from the gross receipts figure of $461,000 in Schedule C in the final 1967 return (prepared by some unknown person never called by the government to

testify), which also had a UCC component of $291,000. This argument is frivolous.

The allegedly omitted amounts were payments by Treadwell to Leonard, not by UCC. Therefore, they were not included (and should not have been included) in the $291,000 UCC component, because that component consisted exclusively of net payments received by Leonard from UCC.

The government was therefore obligated, but failed, to prove that $24,168 in Treadwell payments were not included in the portion ($170,000) of the $461,000 of gross Schedule C receipts which was not made up of UCC receipts. The government's sole witness on this point, Miss Bardes, never testified as to the make up of the $170,000. While her work papers (GX 92; pages 01904 and 01905 at E-408-09) reflect apparent sources of such income, she testified that she could not "honestly" say where she obtained these figures, but assumed she "got them through Mr. Leskowicz" (A. 432).

The government claims, nonetheless, that "the remaining components of the $461,000 [i.e., the $170,000] are identified in Leonard's own handwriting throughout the FNCB monthly statements for 1967 (GX 76 at E. 283-295) (G. Br. 68). However, there is simply no testimony that these handwritten, cryptic notes belong to Leonard rather than to Miss Bardes.*

Rather than seeking to have this Court speculate about these cryptic notes and "the remaining components", the government should have called the taxman who actually prepared the final 1967 returns and asked him explicitly whether or not the Treadwell payments were included in his calculations. Miss Bardes, who prepared only a draft return and who could not "honestly" state where she obtained the numbers she placed on the draft, was not a

* Although in some cases, the jury may be allowed to infer whether questioned handwriting was the defendant's, the handwriting on the FNCB monthly statements are mere cryptic notes and, further, the government's present claim that these notes were Leonard's was not raised below as a jury issue but is simply an afterthought.

sufficient substitute, especially since the draft she prepared differed materially from the final 1967 return.*

2. Leonard never told Laski that he had not received "any of the 10% payments".

Aware that the Bardes testimony was inadequate to establish that the Treadwell payments were omitted, the government asserts that "Leonard's oral statement to Laski that he had not received any of the 10% payments under the altered paragraph 3(e) of the UCC contract is independent proof that his 1967 return . . . did not include those sums in some other account" (G.Br. 69). This assertion is totally inaccurate.

Not only is there no citation to the record given in support of this claim, but Laski's testimony demonstrates that Leonard never said that he had not received "any of the 10% payments." At the one interview which Laski claimed occurred on March 17 or 18, 1969, Laski recalled:

> ". . . I asked him about Section 3(e) about this override, where there was a crossing out but no initials and he said the contract was changed. . . .
>
> "I asked him why the paragraphs in the back were changed with initials, one paragraph, which is Section 3, about the override was changed without initials, while the paragraph about the $37,000 a month payable was not crossed out or initialled at all, and I didn't receive much of a response on that, if any." (A. 207-308)

In fact, as the evidence established, the contract as to Leonard's right to receive a 10% override was changed; the engineering work was eliminated and Leonard's override with it when UCC chose not to build the South Charleston plant (A. 98). In any event, while this did not affect the payments due to Leonard on the Taft project, there was simply no testimony that Leonard told Laski that he had not received any of the override payments.

Consequently, the government failed to prove that

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* See A. Br. 58-60 for a detailed statement of the differences between her draft (GX 92) and the final 1967 return (GX 1).

$24,168 in Treadwell payments were omitted from Leonard's 1967 tax return and therefore his conviction on Count I should be reversed.

POINT VI

Leonard and UCC agreed in writing to the assignment of the UCC contract to Leonard Corp. as of February 1, 1968. The government's claim that this assignment was invalid is frivolous.

The government's assertion that Leonard evaded taxes on substantial UCC payments is totally inaccurate.

1. UCC and Leonard considered the assignment to Leonard Corp. as valid and proper.

Leonard demonstrated in his brief (at A. Br. 61-65) that by virtue of the assignment of the UCC contract, as of February 1, 1968, to Leonard Corp. (his tax-option subchapter S corporation), he was not required to report on his personal 1968 tax return $52,455.22 out of $58,684.42 of Treadwell payments which the indictment charged had been improperly omitted.

In response, the government asserts a new argument not made below that Leonard's assignment of the UCC contract to Leonard Corp. was invalid (G. Br. 5-6, 69-71). This assertion is factually and legally frivolous.

The assignment was consented to and ratified by UCC in writing. GX 65. Indeed, the government's argument is simply a recent afterthought since it was the government that proved the assignment as well as UCC's written consent on its direct case (A. 97-98).

More particularly, the government elicited the following during direct examination of Henry Mitchell, a UCC official who signed the original UCC contract:

> "Q. . . . Did there come a time when that contract [GX 3] was assigned by Mr. Leonard to another legal person or entity? A. Oh, yes. Some months after that —I don't know, maybe six months or something, after that—Jack Leonard changed the corporate or partnership format of his organization from let's call it, from A to B, and that changed, which Jack requested us to

A to B, and that changed, which Jack requested us to agree to. After review by our lawyers, I did [agree] and I am sure there's an amendment setting forth and change . . ." (A. 97-98).

Furthermore, while the UCC contract required "prior written consent" to any assignment by Leonard, this provision was for UCC's benefit and was a stipulation that UCC could have insisted on, but one which it could also have waived. See *Lee* v. *Casualty Ins. Co. of America*, 90 Conn. 202, 96 A. 952. See *Corbin Contracts*, §§ 752-766; Williston, Contracts §§ 678, 679, 683-82. In fact, UCC did precisely that by consenting in writing to Leonard's assignment to Leonard Corp. GX 65 at E-171 (A. 97-98).*

Consequently, inasmuch as UCC consented to the assignment, it is simply absurd for the government (which was not a party to the UCC contract) to assert that, as between UCC and Leonard, the assignment was invalid.

2. The government's assertion that Leonard evaded taxes on substantial UCC payments is totally inaccurate.

The government alleges that "Leonard included only $328,000 of UCC receipts during 1967 and 1968 in any tax returns, despite the fact that he actually received UCC checks in those years totalling $1,461,341.61" (G. Br. 4-5). This claim is misleading and the innuendo that Leonard was guilty of evading taxes on substantial amounts of direct UCC payments totally inaccurate.

Leonard was not charged with omitting any UCC payments; he was only charged with not including specific payments from Treadwell. More importantly, Leonard received two types of payments from UCC; first, net payments totalling $750,000 (GX 3, ¶'s 3(f)-3(g) at E. 62-63) and second, payments for engineering work done by Treadwell (referred to hereinafter as "Treadwell payments") which totalled $911,341.61 (GX 3, ¶ 3(e) at E-62). Immediately upon receipt of Treadwell payments, Leonard's procedure was to endorse over the UCC checks to Treadwell (GX 44-48, 50-53 at E-152-170); the transac-

* Therefore, since the assignment was effective February 1, 1968, there is no merit to the government's alternative claim that money received from Treadwell prior to March 22, 1968 could not "even arguably" belong to Leonard Corp. (G. Br. 71).

tions, which involved a complete "wash" having "zero" tax consequences, merely gave Leonard some control over Treadwell's work (A. 352-4).

The government concedes that four $37,000 checks, apparently issued by UCC in late 1967, were deposited by Leonard in 1968 (G. Br. 8-9, 25); three $37,000 checks were deposited to Leonard Corp.'s account at FNCB in February 1968 and included in the fiscal 1968 return (GX 15, 17, 19 at E. 133, 135, 137 (DX Y at E)); and the one remaining $37,000 check was deposited in January 1968 and included in Leonard's 1968 return (GX 78 at E. 301; GX 49 at E. 125; GX 2 at E. 33). Consequently, the only allegedly unreported amounts were payments by Treadwell (not by UCC) to Leonard which totalled $24,168 in 1967 and $58,684.42 in 1968.

Inasmuch as the court refused the defendant's request to charge the jury on the effect of the assignment of the UCC contract, the jury considered Count II on an erroneous theory. See *U.S.* v. *Jacobs*, 475 F.2d 270, 283 (2d Cir. 1973); *Nicola* v. *U.S.*, 72 F.2d 780, 787 (3rd Cir. 1934). Consequently, Leonard's conviction should be reversed as to Count II and a new trial granted.

CONCLUSION

The judgment of conviction should be reversed and the indictment dismissed.

Alternatively, a new trial should be granted and all evidence attained as a result of the illegal mail watch and the failure of the IRS to properly warn Leonard of his constitutional rights should be suppressed.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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UNITED STATES OF AMERICA,
Appellee,

-v-

JACKSON D. LEONARD,
Defendant - Appellant.

AFFIDAVIT OF SERVICE

STATE OF NEW YORK,
COUNTY OF NEW YORK, ss.:

Nathan Chambers, being duly sworn, deposes and says that he is over the age of 18 years, is not a party to the action, and resides at 510 Atlantic Ave., Brooklyn, New York
That on July 8, 1975, he served 3 copies of Reply Brief and 1 Notice of Motion

on

Paul J. Curran
United States Attorney for the
Southern District of New York
One St. Andrew's Plaza
New York, New York 10007

by delivering to and leaving same with a proper person or persons in charge of the office or offices at the above address or addresses during the usual business hours of said day.

Nathan Chambers

Sworn to before me this
8th day of July, 1975.

John V. D'Eposito

JOHN V. D'EPOSITO
Notary Public, State of New York
No. 30-0952000
Qualified in Nassau County
Commission Expires March 30, 1977